

Mechanic's and Materialman's Liens

By Clark Watson and Mike Waters

Mechanic's and materialman's liens are created pursuant to Alabama Code §§ 35-11-210 through 35-11-234. In general, the lien may be established in favor of a person or entity that performs labor or provides materials for the construction of buildings or making other improvements on real property or for "repairing, altering or beautifying" the property. The rationale for the lien is that a property owner should not enjoy the benefit of improvements made on his land without making just compensation to the person who provided the associated labor and materials. Banks, as lenders, have a keen interest in understanding how these liens work to insure that their mortgages are not impaired.

Two Types of Liens

Alabama law provides for two separate and distinct mechanic liens: the *full-price lien*, which is a lien for the full price of the services or materials provided to the property for its improvement; and the *unpaid-balance lien*, which is a lien that extends only to the amount of any unpaid balance owed by the owner to the prime contractor. A full-price lien requires an express or implied contract with the property owner or the owner's agent. A prime contractor or material supplier with a direct contractual relationship with the property owner may be entitled to a full price lien. A material supplier may also be entitled to a full-price lien if it provides written "pre-lien notice" before the material is delivered, which advises the owner that the supplier will be delivering specified materials to the owner's property at specified prices and that the supplier will claim a lien for any unpaid balance of that price, as specified in the notice (note the emphasis on specificity). Curiously, the form of the pre-lien notice included in Alabama Code § 35-11-210 is not as specific as § 35-11-210 seems to require. The owner may object to the notice in writing prior to incorporating the materials into the project. If the owner does not timely object, the materialman is deemed to have an implied contract with the owner that entitles the sup-

plier to a full price lien. Prime contractors generally disfavor material suppliers who issue pre-lien notices to project owners since it raises concerns with the property owner that the prime contractor may not be able to meet its payment obligations to subcontractors and material suppliers.

The unpaid balance lien is not premised upon the existence of a contract, either express or implied, with the property owner. Subcontractors and material suppliers generally do not have direct recourse against the owner and are therefore limited to an unpaid balance lien.

Perfection of the Lien

The Alabama statutes that create mechanic liens are strictly construed since the liens, although equitable in origin, do not exist under the common law. Although the full price lien and the unpaid balance lien are created by the same statute, perfection of the two liens is accomplished by different processes. Perfection of both the full price lien and the unpaid balance lien require the claimant to file a verified statement of the lien in the probate court of the county in which the property upon which the lien is claimed is located. The verified statement must contain the amount of the claim, a description of the real property, and the name of the owner or "proprietor" of the property. An approved form of the statement is provided at §35-11-213. Since the verified statement is filed in the public records, it provides constructive notice of the lien to the owner, creditors of the owner, prospective purchasers of the property, and all other interested and potentially-interested parties. Prime contractors must file the verified statement within six months after the last item of work or material is provided by the contractor to the property. Material suppliers (absent an express or implied contract with the owner) and subcontractors have four months after the last item of work or material is provided by the lien claimant. Each "journeyman and day laborer" must file the verified statement within 30 days after he last performs work or labor on the property.

Perfection of an unpaid balance lien also requires

the lien claimant to give "the owner or proprietor, or his agent" written notice that it claims a lien on the property. This notice must be given before the verified statement of lien is filed with the judge of probate. The statute does not provide guidance on how much advance notice is required. The notice must include the amount of the claim, a description of the services or materials provided by the claimant, and the identity of the person or entity that is obligated to pay the claim. Upon giving this notice, any amounts then owed by the owner are subject to the lien and must be retained by the owner.

If compliance with the foregoing procedures does not result in a resolution of the amounts owed to the lien claimant, an action to enforce the lien must be brought in the county where the real estate is located. The lawsuit must be commenced within six months after the maturity of its entire indebtedness that is secured by the lien. The antiquity of some of the Alabama statutes governing mechanic liens (as well as other liens) is evidenced by the requirement that the complaint must be filed in a circuit court if the lien is for more than \$50.00 (which is less than the filing fee). Defendants in the lawsuit must include the owner of the real property (and the contractor if an unpaid balance lien is claimed) and may include "all persons interested in the matter in controversy." This can include any person responsible for the debt and any other person who claims a legal interest in the land, including competing creditors, so that the court can determine the relative priority of the interest holders in the real estate. The court's determination of the lien's priority is critical to its enforcement.

Should the plaintiff in the lawsuit prevail, it may be entitled to a judgment that establishes the lien and the amount that it secures (including interest and cost), as well as a judgment that makes one or more of the defendants liable for all or a portion of the amount that is claimed. A judgment establishing the lien can not be entered absent a money judgment against one or more persons that are liable for payment of the claim. The amounts of these judgments may be different for a variety of reasons. For example, the unpaid balance amount may be less than the total amount of the monetary claim of the lien claimant. Accordingly, the plaintiff may be entitled to a judgment against a defendant for the full amount claimed, yet the amount that is secured by the lien will be a lesser amount. The judgment establishing a lien may prescribe a procedure for the sale of the property and satisfaction of the lien, including a writ of execution commanding the sheriff to levy upon and sell the property.

Effective Date of the Lien

The lien is effective as of the date that materials are first provided to or labor is initially performed upon the property. The lien remains inchoate until a verified statement of lien is timely filed with the judge of probate. The choate lien then relates back to the date that the material or labor was first provided to the property, and has priority over encumbrances attaching after that date. The "relation back" rule can impose harsh results upon mortgage lenders and purchasers who acquire their interests in the property

without knowledge of the prior work. Lenders are encouraged to inspect the property shortly before the closing of a mortgage loan and to obtain appropriate lien waivers and subordination agreements if prior construction activity of any kind has been conducted on the site.

Priority of the Lien

Pursuant to § 35-11-228, all mechanic liens "shall stand on equal footing," except for liens in favor of an original contractor. The order in which the liens are filed or otherwise perfected does not determine their relative priority. If the proceeds from the sale of the property (plus and funds collected from the owner) are not sufficient to pay all of the liens in full, the lien claims are to be paid pro rata. For this reason it is important that owners, mortgagors and title insurers, among others, not pay or commit to pay lien claims until the full universe of potential lien claims is defined.

Transferring the Lien

Any person with an interest in either (a) the real property upon which a lien is established or (b) the contract under which the lien is claimed, may cause the lien to be transferred from the real property to other security. This is accomplished by delivering to the court in which the action to enforce the lien is brought either a sum of money or a bond as required by § 35-11-233. This "substitute security" must be equal to 124% of the amount demanded in the lien plus \$100.00. If a bond is employed, the surety must be an insurer licensed to do business in Alabama. The court prepares and delivers to the lien claimant a certificate describing the proposed transfer of the lien to the substitute security. The lienor then has ten days from its receipt of the certificate to object to the transfer. Otherwise, the real property is released from the lien. From time to time thereafter, any party in interest may bring an action in the court to increase or reduce the security, substitute sureties, discharge the surety or make any other request concerning the surety.

Conclusion

The Alabama law on mechanic's and materialman's liens can be an effective means to ensure payment to contractors and material suppliers. It is also a quagmire of procedural pitfalls and harsh consequences for those claiming the lien as well as for other persons who have an interest in the real property on which construction activities have occurred. Banks should be cautiously and appropriately diligent to make sure that their mortgages are not unexpectedly impaired by the claims of persons who have not been paid for their work on the mortgaged property. ■



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